IN THE

Supreme Court of the United States

DEC 22 1969
JOHN F. DAVIS, CLERK

OCTOBER TERM, 1969

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No. _____

TAMPA PHOSPHATE RAILROAD COMPANY,
Petitioner,

-vs-

SEABOARD COAST LINE RAILROAD COMPANY
Respondent.

BRIEF OF RESPONDENT ON PETITION FOR WRIT OF CERTORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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FREE PRESS PUB. CO., INC. - TAMPA

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BRIEF OF RESPONDENT ON PETITION FOR WRIT OF CERTORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PRELIMINARY STATEMENT

Pages 29-31 of the brief, pages 171-194 of the Appendix and the Supplement to Petition are completely outside the record in this case, are immaterial, are unauthenticated and on their face show dates not only subsequent to the Order of the District Judge but also subsequent to the oral argument and partly after the Rehearing was denied by the Fifth Circuit. They should be stricken or ignored, as they add nothing to the case even if they were properly before the Court. *Holmes v. Trout,* 32 U.S. 171, 7 Pet. 171, 8 L.Ed. 647 (1833); *Kerr v. Clampitt,* 95 U.S. 188, 24 L.Ed. 493 (1877); *Thomson v. Gaskill,* 315 U.S. 442, 62 S.Ct. 673, 86 L.Ed. 951 (1942).

QUESTIONS PRESENTED BY PETITIONER

1. WAS THE INJUNCTION ISSUED BY THE ONE JUDGE FEDERAL DISTRICT COURT STAYING THE EMINENT DOMAIN PROCEEDINGS IN THE STATE COURTS EXPRESSLY AUTHORIZED BY ACT OF CONGRESS?

2. IS THE CONSTRUCTION OF §1(20) TO BE THE EXPRESS AUTHORITY OF AN ACT OF CONGRESS TO STAY THE EMINENT DOMAIN PROCEEDINGS IN THE STATE COURTS, EITHER (a) A DECISION OF THE COURT OF APPEALS IN CONFLICT WITH THE APPLICABLE DECISIONS OF THIS COURT OR (b) SUCH A DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR THE EXERCISE BY THIS COURT OF ITS POWER OF SUPERVISION?

3. DOES THE CONSTRUCTION OF §1(20) and §§2321-2324 AS DEPRIVING TAMPA OF THE RIGHT TO HAVE ANY JUDICIAL TRIAL ON THE QUESTION OF THE JURISDICTION OF THE COMMISSION DENY TAMPA DUE PROCESS OF LAW UNDER THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES?

4. DOES THE CONSTRUCTION OF §1(20) and §§2321-2325 AS OUSTING THE STATE COURTS OF THE POWER TO DETERMINE THEIR OWN JURISDICTION IN EMINENT DOMAIN PROCEEDINGS INVADE THE RESERVED POWERS OF THE STATES IN VIOLATION OF THE TENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES?

POINTS URGED BY PETITIONER

POINT I

THE OPINION OF THE COURT OF APPEALS CHANGED THE CHARACTER OF THE INJUNCTION AND TERMINATED THE LITIGATION.

POINT II

THE DECISION OF THE COURT OF APPEALS IS IN CONFLICT WITH THE APPLICABLE DECISIONS OF THIS COURT.

POINT III

THE DECISION OF THE COURT OF APPEALS DEPARTS FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS SO AS TO CALL FOR THE EXERCISE BY THIS COURT OF ITS POWER OF SUPERVISION.

POINT IV

§1(20) and §§2321-2325 AS NOW CONSTRUED, BY DENYING TO TAMPA ANY JUDICIAL DETERMINATION OF THE JURISDICTION OF THE COMMISSION DENY TAMPA DUE PROCESS OF LAW UNDER THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

POINT V

THE CONSTRUCTION OF §1(20) and §§2321-2325 AS OUSTING THE STATE COURTS OF THEIR OWN JURISDICTION IN EMINENT DOMAIN PROCEEDINGS INVADES THE RESERVED POWERS OF THE STATES IN VIOLATION OF THE TENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

POINT VI

THE OPINION OF THE COURT OF APPEALS PRESENTS SERIOUS QUESTIONS OF FEDERAL LAW WHICH HAVE NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

STATEMENT OF THE CASE

The history of the Proceedings and of the case was accurately and adequately stated by Circuit Judge Goldberg in the opinion of the Fifth Circuit:

"This case involves the right of a company to condemn lands in furtherance of its railroading ambitions after it has been denied a certificate of public convenience and necessity by the Interstate Commerce Commission. We must decide whether a federal district court has the power under 49 U.S.C.A. §1(20) to issue an injunction against condemnation proceedings in state courts that are said to violate §1(18) of the Interstate Commerce Act. We also find it necessary to consider what defenses, if any, may be asserted in opposition to the alleged violation.

The history of this case begins in July of 1965 when Tampa Phosphate Railroad Company (Tampa), a corporation not yet operating as a railroad, filed an application with the Interstate Commerce Commission (Commission) questing for authority to construct a railroad under Section 1(18)-1(22) of the Interstate Commerce Act. See 49 U.S.C.A. §1(18-1(22). In its application Tampa declared that the proposed railroad was intended primarily to transport phosphate rock and all products thereof from Port Sutton in Hillsborough County, Florida, to a point some thirty miles away in Polk County, Florida. Tampa prayed for the grant of a certificate authorizing construction of this railroad, and in the alternative for dismissal of its application as beyond the Commission's jurisdiction. Tampa contended in support of this alternative that (a) its proposed railroad would operate

only in *intrastate* commerce, and (b) that the line would constitute a spur or industrial track within the exemption of 49 U.S.C.A. §1(22).

After hearings, the Interstate Commerce Commission examiner recommended denial of the application. He held that the Commission did have jurisdiction because the proposed railroad would operate in *interstate* commerce, and he found that the new trackage would not constitute a spur or industrial track within the meaning of §1(22). He then denied Tampa's application, ruling that construction and operation had not been shown to be required by the present and future public convenience and necessity.

Subsequent to the completion of the administrative hearing, the Interstate Commerce Commission found in a decision dated August 7, 1967, that "the findings and conclusions of the hearing examiner on matters of fact and law considered and disposed of in his report and recommended order are in all material respects proper and correct." The order of the examiner denying Tampa's application was thereupon affirmed and adopted by the Commission. No appeal was taken from this order.

Following the denial of its application, Tampa directed its full energies toward a series of condemnation suits then in progress in the state courts of Florida. The first and second of these suits had begun on October 13, 1965, in the Circuit Court of Hillsborough County, Florida, while Tampa's application was still pending before the Commission. The third suit began a short time later in the Circuit Court of Polk County, Florida. In all proceedings Tampa sought easements or rights-of-way for its proposed railroad across existing trackage of the Seaboard Coast Line Railroad Company (Seaboard). As authority for these easements, Tampa relied upon certain Florida eminent domain statutes

permitting one railroad to cross the tracks of another railroad. See F.S.A. §§73.012, 73.021, 73.151, 360.101, 361.01. Seaboard opposed Tampa's petition in each state court and sought dismissal of the actions on the grounds, *inter alia,* that the proposed construction would be in interstate commerce and that the Commission had denied Tampa the requisite certificate. The Circuit Court of Polk County, apparently reserving its ruling on Seaboard's motion to dismiss, scheduled the matter for trial on December 18, 1967.

Meanwhile, Seaboard had initiated this suit in the United States District Court for the Middle District of Florida. Seaboard there sought an injunction to prevent Tampa from continuing condemnation proceedings against Seaboard's property, and further sought to enjoin Tampa from constructing or operating any railroad facilities without first procuring a certificate from the Commission. Tampa's actions were alleged to be in violation of §1(18) of the Interstate Commerce Act, 49 U.S.C.A. §1(18), and an injunction was sought under §1(20) of the Act, 49 U.S.C.A. §1(20), to prevent further violations.

Tampa responded to Seaboard's complaint with an answer and with a motion to dismiss. Argument on the motion to dismiss was held on December 12, 1967, and on December 14, 1967, the district court denied Tampa's motion to dismiss and granted a preliminary injunction against any condemnation of Seaboard's property or construction thereon until a certificate of convenience and necessity was procured from the Commission. In its findings of fact and conclusions of law, the court found that it had jurisdiction under 28 U.S.C.A. §89(b), 28 U.S.C.A. §1337, and 49 U.S.C.A. §1(18-1(20). It also found that Seaboard was a proper party in interest within the meaning of 49 U.S.C.A. §1(20). The

court overruled Seaboard's motion for judgment on the pleadings, holding that the order of the Interstate Commerce Commission was not res judicata on the intrastate or interstate character of the proposed railroad. It then reserved this issue of interstate commerce for independent investigation at a later date. The court also determined that the provisions of 28 U.S.C.A. §2283 "are not applicable or controlling in this case."

Further argument was heard on the case on March 6, 1968, and on April 22, 1968, the court overruled Tampa's motion to dissolve and vacate the preliminary injunction. Again the court reserved ruling on the interstate or intrastate character of the proposed railroad. Tampa appeals to this court from the denial of its motion to vacate. 28 U.S.C.A. §1292(a) (1).

ARGUMENT

PETITIONER'S POINT I

THE OPINION OF THE COURT OF APPEALS CHANGED THE CHARACTER OF THE INJUNCTION AND TERMINATED THE LITIGATION.

The concurring opinion would hold that the injunction against construction of the Tampa Phosphate Railroad without first obtaining a Certificate of Convenience and Necessity should be made permanent. This is the correct position. Tampa originally invoked the jurisdiction of the ICC by asking for such certificate. The ICC found that the proposed operation would be in interstate commerce and Tampa's defense to the 1(20) action was on the theory that its operation will be solely intrastate. Acceptance of this defense would annul the decision of the ICC in effect, so it would clearly involve a collateral attack on that order. The ICC order cannot be attacked collaterally and should be reviewed by a three-judge court.

ICC orders can only be reviewed by a three judge court under the Urgent Deficiencies Act. See *United States v. Southern Ry. Co.*, 364 F.2d 86 (CA 5, 1966) cert. den. 386 U.S. 1031 and *United States v. Southern Ry. Co.*, 380 F.2d 49 (CA 4, 1967).

The rule precluding collatteral attack of ICC orders has also been recognized in *Nelson v. United States*, 355 U.S. 544 (1958); in *Seatrain v. Penn. R. Co.*, 207 F.2d 255 (CA 3, 1953), cert. den. 345 U.S. 916, 73 S.Ct. 727 (1953) (where an unappealed ICC ruling as to its jurisdiction was held res judicata in subsequent injunction suit); *Village of Mantorville v. Chicago G. W. R.*

Co., 8 Fed. Supp. 791 (D. Minn. 1934) *Riss & Co. v. United States*, 117 F.Supp. 296 (W.D. Mo. 1952) and many others.

But the Court of Appeals did not so rule. The cause was remanded for further proceedings with tacit permission for Petitioner to litigate the question of whether its operation would be subject to regulation by the ICC, provided the operation has been modified to the extent necessary to avoid the application of collateral estoppel. At this juncture the matter is still interlocutory in nature and the order should not be disturbed.

Nor does §2283 constitute a legitimate objection to the maintenance of the injunction suit.

SCL asked for and got a temporary injunction pursuant to 49 U.S.C.A. §1(20) against construction of a new line of railroad without first obtaining the Certificate required by 49 U.S.C.A. §1(18), and against the prosecution of the State Court condemnation suits as a part of the construction. Petitioner's statement that "the only relief prayed for was the restraint of the state courts" is untrue but immaterial.

Section 2283 does not bar injunctions expressly authorized by Act of Congress or where necessary in aid of the Court's jurisdiction or to protect or effectuate its judgments.

Section 1(18) bars construction without a certificate. The eminent domain suits were as much a part of the construction as driving spikes. Section 1(20) expressly authorizes injunctions against such construction in violation of §1(18); See *St. Louis S. W. Ry.*

Co. v. Missouri Pac. R. Co., 289 U.S. 76, 53 S.Ct. 516 (1933). See also *Dilworth v. Riner*, 343 F.2d 226 (CA 5, 1966), and the many cases cited by the Court below.

And the injunction against the State Court proceedings if not expressly authorized by §1(20) was necessary in aid of the courts jurisdiction to enjoin the construction in violation of §1(18), as Tampa should not be permitted to condemn railroad land under a state statute for the purpose of constructing a railroad which the Federal law bars the construction of.

Nor has the argument about concurrent jurisdiction any merit. There was no state court §1(20) suit and there was no Federal Court condemnation.

The §1(20) injunction sought and obtained by SCL was not barred by §2283.

PETITIONER'S POINT II

THE DECISION OF THE COURT OF APPEALS IS IN CONFLICT WITH THE APPLICABLE DECISIONS OF THIS COURT.

The decision of the Court of Appeals is not in conflict with the previous decisions cited by Petitioner or with any other decisions.

Dowd Box Co. v. Courtney, 368 U.S. 502, 82 S.Ct. 519, 7 L.Ed.2d 483 (1962) only held that a statute providing that certain rights could be enforced in Federal Court did not prevent enforcement of the same rights in State Court. *Chaflin v. Houseman,* 93 U.S. 130, 23 L.Ed. 833 (1876) held that a statute authorizing a Trustee in Bankruptcy to sue in Federal Courts did not prevent his bringing an action in a State Court.

These cases might be in point if a §1(20) injunction against construction in violation of §1(18) had been sought in state court and had been dismissed because of exclusive jurisdiction of Federal Court to grant such injunction[1] but such was not the case. No §1(20) suit was ever brought in state court. The only actions brought in state court were petitioner's eminent domain proceedings. The only court where §1(20) proceeding was instituted was the United States District Court.

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[1] Although it may well be that Federal Courts do have exclusive jurisdiction to grant such remedy — See *Meyers v. Famous Realty, Inc.,* 271 F.2d 811 (2d Cir. 1959) cert. den. 362 U.S. 910, 80 S.Ct. 681, 4 L.Ed2d 619, wherein the Second Circuit said "it is clear that the United States District Court is the only forum having jurisdiction to prevent an illegal abandonment begun without the institution by the Carrier of a Section 1(20) proceeding before the Commission.

Nor is there any conflict with the other cases cited in Point II. The question of whether a §1(20) action *can* be maintained in a state court was not reached by this Court. The statute provides that unauthorized construction "*** may be enjoined by any Court of competent jurisdiction at the suit of *** any party in interest; ***" No such suit is or was pending in the state courts. Tampa merely sought to condemn lands. SCL did not institute the condemnation proceedings and did not ask the State Courts to enjoin construction. SCL did what this Court told it was the proper procedure in *St. Louis South Western Ry. Co. v. Missouri Pacific R. Co., supra.* In that case the Mo. Pac. sued in State Court seeking the right to cross the St. Louis in connection with proposed construction. St. Louis interposed the defense that the line could not be built under §1(18) without ICC authorization. This Court held that the proper remedy for St. Louis was "*** not by way of defense to an application to fix the place and manner of crossing" but by "a proceeding to enjoin" under §1(20) (289 U.S. at 81-83), which could be done in Federal Court. Following the advice of this Court, SCL did precisely that and filed a §1(20) injunction action in Federal Court.

Instead of conflicting with previous decisions, the procedure followed and the Court's ruling precisely followed the authorities.

The Petition should be denied.

PETITIONER'S POINT III

THE DECISION OF THE COURT OF APPEALS DEPARTS FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS SO AS TO CALL FOR THE EXERCISE BY THIS COURT OF ITS POWER OF SUPERVISION.

Point III appears to raise substantially the same questions as Point II and is bottomed on the same erroneous interpretation of the proceedings below.

The state courts were not ousted of any jurisdiction. No §1(20) action was attempted in the State Courts. The only §1(20) action filed was in the Federal Court for the purpose of enjoining construction of a railroad in violation of §1(18), as was expressly authorized by that Act of Congress. A vital first step to the construction of the railroad was obtaining the right of way, so the eminent domain proceedings were enjoined also.

Had Tampa not invoked the jurisdiction of the ICC by filing an application for a Certificate of Convenience and Necessity, the collateral estoppel doctrine would not be invoked and the District Court would have free rein on the question of whether the proposed construction would be in interstate commerce or not. But Tampa did apply to the ICC which found that it had jurisdiction (that the proposed railroad would be in interstate commerce) but denied the certificate. Being unsatisfied by this ruling, Tampa, rather than accept or appeal it, chose to ignore it, apparently feeling that it would go away. This it cannot do and the Court quite

correctly held that so long as the ICC order remains outstanding the only way to attack matters litigated there is by direct attack under the Urgent Deficiencies Act and that the doctrine of collateral estoppel prevents its relitigating the question in Court unless it first shows that it has so modified its proposed railroad as to take itself out from under the doctrine of collateral estoppel. The court should have held, as suggested in the concurring opinion, that the doctrine applies and that Tampa cannot build its railroad without first:

(a) getting a certificate of convenience and necessity from the ICC, or

(b) appealing the ICC jurisdictional findings to a three judge court under the orderly procedure provided by Congress therefor.

The only case cited by petitioner under this point is a Jones Act case which has nothing to do with any issue before the lower Courts or this court.

PETITIONER'S POINTS IV AND V

§1(20) AND §§2321-2325 AS NOW CONSTRUED, BY DENYING TO TAMPA ANY JUDICIAL DETERMINATION OF THE JURISDICTION OF THE COMMISSION DENY TAMPA DUE PROCESS OF LAW UNDER THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

THE CONSTRUCTION OF §1(20) AND §§2321-2325 AS OUSTING THE STATE COURTS OF THEIR OWN JURISDICTION IN EMINENT DOMAIN PROCEEDINGS INVADES THE RESERVED POWERS OF THE STATES IN VIOLATION OF THE TENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

These constitutional points were not raised in the District Court and were not mentioned in the Court of Appeals until October 13, 1969 in Tampa's Petition for Rehearing after rendition of the Opinion of the Fifth Circuit.

Questions not raised in the proceeding below are not open in a proceeding on petition for certiorari. *Ellis v. Dixon,* 349 U.S. 458, 75 S.Ct. 850 (1955); *Nelson v. County of Los Angeles,* 362 U.S. 1, 80 S.Ct. 527 (U.S. 1960); *F & C v. Travelers Health Assn.,* 362 U.S. 293, 80 S.Ct. 717 (1960); *U.S. v. Fleischman,* 339 U.S. 349, 70 S.Ct. 739 (1950).

Further, petitioners argument on these points is patently fallacious. *Texas and Pacific v. Gulf,* 270 U.S. 266, 70 L.Ed. 578 (1926) did *not* hold that an ICC order could be collaterally attacked or attacked at all other than by direct attack to a three judge court. There was no ICC order involved in that case. It merely held in that context that one railroad could bring a §1(20) suit in Federal Court to enjoin construction in violation of §1(18) in which event the Court would determine whether the construction would violate §1(18). This is just what the District Court here proposed to do and

what the Court of Appeals told it to do even though the ICC had already ruled that the operation would be in interstate commerce.

And Petitioner, apparently still relying on *Piedmont & Northern v. United States,* 280 U.S. 469, 74 L.Ed. 551 (1930) in spite of the fact that it was specifically overruled by *Rochester Telephone Corp. v. United States,* 307 U.S. 125, 59 S.Ct. 754, 83 L.E. 1147 (1939) and by *United States v. Maher,* 307 U.S. 148, 59 S.Ct. 768 (1939), claims the right to a trial de novo, citing as further authority for such right *United States v. Idaho,* 298 U.S. 105, 56 S.Ct. 690, 80 L.Ed. 1070 (1936), a case brought before a three judge court under the Urgent Deficiencies Act and appealed to this Court.

Tampa's right to its day in Court has not been impaired nor has the lower court impinged on the jurisdiction of the State Courts.

On the contrary, to adopt petitioners position would be to usurp for the State Courts the jurisdiction of the three judge federal court.

PETITIONER'S POINT VI

THE OPINION OF THE COURT OF APPEALS PRESENTS SERIOUS QUESTIONS OF FEDERAL LAW WHICH HAVE NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

The text under Point VI does not support the Point as stated and the cited case supports neither.

This point is not well taken.

CONCLUSION

The decision of the Court of Appeals was correct, was supported by the previous decisions, does not conflict with previous decisions of other circuits, there are no constitutional rights affected and no reason has been shown why this Court should elect to take jurisdiction. The petition for writ of certiorari should be denied.

Respectfully submitted,

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By_____
WILLIAM A. GILLEN

By_____
JAMES E. THOMPSON

CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that on this 20th day of December, 1969, one copy of the foregoing Petition for Writ of Certiorari was furnished by delivery to James B. McDonough, Jr. and one copy also by delivery to David C. G. Kerr both of Messrs. Macfarlane, Ferguson, Allison and Kelly and that one copy of the same was furnished by air mail with postage prepaid to the Solicitor General, Department of Justice, Washington, D. C., and in like manner one copy was furnished to John H. D. Wigger, Esq., Department of Justice, Washington, D. C., and in like manner one copy each to Robert W. Ginnane, Esq., and Jerome Nelson, Esq., Counsel for the Interstate Commerce Commission, Washington, D. C., and that copy has also been furnished by air mail with postage prepaid to the Clerk of the United States Court of Appeals for the Fifth Circuit, 400 Royal Street, New Orleans, Louisiana.

s/JAMES E. THOMPSON

Counsel for Respondent